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Gerard Jude Timothy Pereira v Kasi a/l KL Palaniappan

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-975–06 OF 2015
LIM YEE LAN, VARGHESE GEORGE AND IDRUS HARUN JJCA
10 JULY 2017

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Contract — Loan — Friendly loan — Appellant claimed against respondent for return of friendly loan — Whether appellant proved claim on balance of probabilities — Whether notice of demand corroborative evidence of friendly loan — Whether settlement agreement alluded friendly loan

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The appellant claimed against the respondent for a return of a sum of RM2.67m which was given to the respondent as personal loans. The sum was effected under various payments made through telegraphic transfers between the years 2008–2009 ('the friendly loan'). The appellant had demanded for the return of the friendly loan from the respondent through two notices of demand, however the respondent did not reply to the said notices. The respondent admitted receipt of the payments but denied it was for a friendly loan. Subsequently, the appellant filed an action in the High Court during which both parties testified on their own behalf. No other witness was called by either party. At the end of the trial, the learned trial judge dismissed the appellant's claim on the basis that the appellant failed to prove on a balance of probabilities that the said sum was for a friendly loan. Aggrieved by the decision, the appellant filed the present appeal. The issues in this appeal were: (a) whether the appellant proved his claim on a balance of probabilities; (b) whether the notices of demand were corroborative evidence of the friendly loan; and (c) whether the settlement agreement alluded the friendly loan.

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Held, allowing the appeal with costs of RM15,000 and setting aside the order of the High Court:

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(1) The burden on the appellant was only to prove a case on a balance of probabilities. The learned trial judge ought to have held that based on the facts and circumstances of this case, in the absence of any explanation from the respondent on the purpose of the payments, the appellant's version that the payments to the respondent were for a friendly loan must be true (see para 31).

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(2) The respondent's explanation defied common sense and logic and was not in compliance with ordinary human conduct. The respondent's explanation for his complete silence was a mere excuse and an

afterthought which had no probative value in law. The appellant should have been held to have admitted to the existence of the friendly loan on this ground alone (see para 46).

(3) The appellant had sufficiently discharged his evidential burden to establish a prima facie case that the payments made to the respondent were for the purpose of a friendly loan and the burden was shifted to the respondent to prove, by admissible evidence based on his pleaded case, that the payments were not made pursuant to a friendly loan, which the appellant had failed to discharge (see para 51).

(4) The learned judge had erred in making the finding that the settlement agreement did not deal with, let alone acknowledge, the existence of any outstanding loan from the appellant to the respondent arising from the payments that were the subject matter of the dispute. This was because he himself had acknowledged at para 48 of his judgment that the settlement agreement was 'to deal with the distribution of the assets of the joint venture and the apportionment of liabilities'. That such was the intention of the parties could be discerned from cl 10 of the settlement agreement. In addition, the trial judge had erred in relying on the settlement agreement as a ground for dismissing the appellants claim as it was not pleaded by the respondent (see paras 54 & 57).

[Bahasa Malaysia summary

Perayu menuntut terhadap responden bagi bayaran balik wang sebanyak RM2.67 juta yang diberi kepada responden sebagai pinjaman peribadi. Jumlah adalah dilaksanakan di bawah pelbagai bayaran yang dibuat melalui pemindahan telegraf di antara tahun 2008–2009 ('pinjaman persahabatan'). Perayu telah menuntut bagi bayaran balik pinjaman persahabatan tersebut daripada responden melalui dua notis tuntutan, walau bagaimanapun responden tidak menjawab notis-notis tersebut. Responden mengaku menerima bayaran-bayaran tetapi menafikan ia adalah untuk pinjaman persahabatan. Kemudiannya, perayu memfailkan tindakan di Mahkamah Tinggi di mana kedua-dua pihak memberi keterangan bagi pihak masiang-masing. Tiada saksi lain dipanggil oleh kedua-dua pihak. Pada akhir perbicaraan, hakim perbicaraan yang bijaksana menolak tuntutan perayu atas dasar bahawa perayu gagal untuk membuktikan atas imbangan kebarangkalian bahawa jumlah tersebut adalah untuk pinjaman persahabatan. Tidak puas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu-isu dalam rayuan ini adalah: (a) sama ada perayu telah membuktikan tuntutannya atas imbangan kebarangkalian; (b) sama ada notis-notis tuntutan adalah keterangan sokongan terhadap pinjaman persahabatan tersebut; dan (c) sama ada perjanjian penyelesaian merujuk kepada pinjaman persahabatan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000 dan mengenepikan perintah Mahkamah Tinggi:

(1) Beban ke atas perayu adalah hanya untuk membuktikan kes atas imbangan kebarangkalian. Hakim perbicaraan yang bijaksana patut memutuskan bahawa berdasarkan fakta dan keadaan kes ini, dalam ketiadaan apa-apa penjelasan daripada responden atas tujuan bayaran, versi perayu bahawa bayaran-bayaran kepada responden untuk pinjaman persahabatan mesti benar (lihat perenggan 31).

(2) Penjelasan responden menentang akal dan logik dan tidak mematuhi dengan tingkah laku manusia biasa. Penjelasan responden bagi senyap sama sekali adalah alasan semata-mata dan sesuatu yang difikirkan kemudian yang tidak mempunyai nilai probatif dari segi undang-undang. Perayu sepatutnya diputuskan untuk mengaku kepada kewujudan pinjaman persahabatan tersebut hanya atas alasan ini (lihat perenggan 46).

(3) Perayu telah secara mencukupi melepaskan beban untuk membuktikan kes prima facie bahawa bayaran-bayaran yang dibuat kepada responden adalah untuk tujuan pinjaman persahabatan dan beban adalah dipindahkan kepada responden untuk membuktikan, dengan keterangan yang boleh diterima berdasarkan kes yang diplidkan, bahawa bayaran-bayaran tidak dibuat berikutan pinjaman persahabatan, yang mana perayu telah gagal untuk melepaskannya (lihat perenggan 51).

(4) Hakim perbicaraan yang bijaksana tersilap dalam membuat dapatan bahawa perjanjian penyelesaian tidak berurusan, sama sekali mengakui, kewujudan apa-apa pinjaman yang belum dibayar daripada perayu kepada responden yang berbangkit daripada bayaran-bayaran yang adalah perkara pertikaian. Ini adalah kerana beliau sendiri telah mengakui di perenggan 48 penghakimannya bahawa perjanjian penyelesaian adalah 'to deal with the distribution of the assets of the joint venture and the apportionment of liabilities'. Niat pihak-pihak yang sedemikian boleh dilihat daripada klausa 10 perjanjian penyelesaian. Selanjutnya, hakim perbicaraan telah tersilap dalam bergantung ke atas perjanjian penyelesaian sebagai alasan untuk menolak tuntutan perayu kerana ia tidak diplidkan oleh responden (lihat perenggan 54 & 57).]

Notes

For cases on friendly loan, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5988–5993.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 587, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Kiaw Aik Hang Co Ltd v Tan Tien Choy [1964] 1 MLJ 99, CA (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 5459, CA (refd)
Tan Aik Teck v Tang Soon Chye [2007] 6 MLJ 97, CA (folld)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, FC (refd)
Wong Hong Leong David v Norazman Bin Adnan [1995] 3 MLJ 283, CA (folld)

Legislation referred to

Evidence Act 1950 ss 101, 103

Appeal from: Writ Summons No 22NCVC-662–05 of 2012 (High Court, Kuala Lumpur)

Kamaleswari Shanmugam Chettier (Kamales & Partners) for the appellant.
CT Siew (Abdullah, Ooi & Chan) for the respondent.

Lim Yee Lan JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of the Kuala Lumpur High Court dated 14 April 2015 in dismissing the appellant's claim against the respondent.

[2] The appellant was the plaintiff and the respondent was the defendant at the High Court. In this judgment, we will refer to the parties as they were in the High Court.

BRIEF FACTS

[3] The plaintiff's claim at the High Court was for the return of a sum of RM2.67m given by him to the defendant as personal loans.

[4] The plaintiff's pleaded case was that the said sum was effected under various payments made through telegraphic transfers between the years 2008 and 2009 ('friendly loan').

[5] The plaintiff sent two notices of demand to the defendant for the return of the friendly loan, the first in September 2011 and the second in May 2012, but there were no replies to the said notices. A

[6] The defendant in his defence admitted receipt of the various payments but denied that it was for a friendly loan and the plaintiff was put to strict proof thereof. B

[7] The case went on a full trial during which the plaintiff and the defendant testified on their own behalves. No other witness was called by both parties. C

DECISION OF THE HIGH COURT

[8] At the conclusion of the trial, the learned trial judge dismissed the plaintiff's claim with costs of RM20,000 on the ground that the plaintiff failed to prove on a balance of probabilities that the said sum was for a friendly loan. D

[9] Briefly the decision of the learned trial judge was premised on the following findings of fact and law: E

(a) there was no documentary evidence that the payments made were in the nature of friendly loans except for the oral testimony of the plaintiff. The Court of Appeal's decision in *Tan Aik Teck v Tang Soon Chye* [2007] 6 MLJ 97, relied on by the plaintiff, does not establish a general principle of law that, where the existence of a friendly loan was alleged, all that the party bearing the evidential burden needs to show is the fact of payment and receipt, which thereafter places the evidential burden on the other party to show that the payment was for some other purpose. Hence, it was not sufficient for the plaintiff to presume the existence of a loan merely by proving the fact of payment by the plaintiff and receipt by the defendant; F G

(b) the letters from the plaintiff dated September 2011 and May 2012 requesting for the return of the loans were inconsequential and cannot be evidence of a friendly loan, even though the respondent failed to reply, since it was issued more than two years from the date the payments were made and were most likely made with intention of litigation. The case of *Wong Hong Leong David v Norazman Bin Adnan* [1995] 3 MLJ 283 cited by learned counsel for the plaintiff ('the plaintiff's counsel') is distinguishable based on the facts; and H I

(c) the settlement agreement that was entered into between the parties meticulously dealt with not only the distribution of the assets of the joint venture but also the apportionment of liabilities. Yet it did not deal

with, let alone acknowledge, the existence of any outstanding loans from the plaintiff to the defendant arising from the payments that were the subject matter of the dispute.

THE APPEAL

[10] The plaintiff appealed against the decision of the High Court and it came before us for determination. During the hearing before us, respective counsel had filed in written submissions supplemented by their oral submissions. We will allude to their submissions in the course of this judgment.

DECISION OF THIS COURT

[11] At the conclusion of hearing this appeal, after having taken into consideration the oral and written submissions of learned counsels and perused the record of appeal, we allowed the plaintiff's appeal with costs and set aside the order of the High Court.

[12] The defendant has applied for leave to appeal to the Federal Court against our decision. We set out the reasons for our decision in allowing the appeal.

REASONS FOR THIS COURT'S DECISION

[13] We were keenly aware that as a general rule an appellate court should be slow to interfere with the findings of fact of a trial court unless the findings were arrived at with no or insufficient judicial appreciation of the evidence before it to render such findings plainly wrong; or the findings were the result of a misdirection by the trial court on the applicable law or there was a wrong application of the law to the facts; or the findings were of a kind which a reasonable court similarly circumstanced which had properly directed itself and asked the right questions would not have arrived at (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 587 (FC), *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA); *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 5459).

[14] In the present case, we were persuaded by the plaintiff's counsel that the learned trial judge had committed the following errors of law and fact which rendered his findings plainly wrong and warranted appellate intervention.

THAT THE PLAINTIFF FAILED TO PROVE HIS CLAIM ON A BALANCE OF PROBABILITIES

[15] In dismissing the plaintiff's claim under this ground, the learned trial judge held that under ss 101 and 103 of the Evidence Act 1950, the plaintiff bears both the legal and evidential burden of proving his case on a balance of probabilities.

[16] The learned trial judge was of the view that the plaintiff in this case had failed to discharge his evidential burden of proof that the payments made to the defendant were pursuant to a friendly loan. This is because apart from the receipt of the moneys by the defendant and the plaintiff's two letters of demand, there was no documentary evidence that the payments made were in the nature of loans except for the oral testimony of the plaintiff.

[17] Before us, the plaintiff's counsel submitted that the learned trial judge erred in holding as such. It was submitted that it was not in dispute that there was no formal agreement between the parties describing the purpose for the payments. Nevertheless, the plaintiff had testified that the transfer and receipt of such monies by the defendant was for the purpose of a friendly loan based on the verbal requests of the defendant. These facts, together with the fact that the defendant had never at any time denied that the payments made to him were for a friendly loan as evidenced by his non-reply to the plaintiff's two notices of demand, were more than sufficient, in the circumstances of this case, to prove on a balance of probabilities that the payments were made by the plaintiff and received by the defendant as a friendly loan and for no other purpose.

[18] In support of his contention learned counsel had cited the decision of this court in the case of *Tan Aik Teck v Tang Soon Chye* in which this court, based on similar evidence as in the present case, had allowed the plaintiff's claim.

[19] The facts in *Tan Aik Teck v Tang Soon Chye* which were said to be similar to the present case were (i) there was no formal loan agreement between the parties; (ii) the alleged friendly loan was given to the defendant via two cheques issued by the plaintiff; (iii) the defendant admitted that he had banked the cheques into his account; (iv) the plaintiff issued a notice of demand for the return of the friendly loan through his solicitor two years after the issuance of the cheques; and (v) there was no reply by the defendant to the said notice of demand.

[20] It was submitted that based on those facts, this court in *Tan Aik Teck v Tang Soon Chye* was prepared to accept that the plaintiff therein had adduced sufficient evidence to discharge his evidential burden of proof that the money

advanced to the defendant through the two cheques was for purpose of a friendly loan.

[21] In holding that the plaintiff therein had proven his claim on a balance of probabilities, Mokhtar Sidin JCA, delivering the judgment of the court held, inter alia, as follows:

> [2] The plaintiff admitted that there was no loan agreement in respect of the loan given to the defendant. The loan given could only be proved by the two cheques which were paid into the defendant's account and also the admission by the defendant that he had put the money into his bank account. Since the defendant had admitted that he had received the two cheques and had credited them into his account, I am of the view that the plaintiff had discharged his burden that the money was a loan unless proven otherwise by the defendant. As such, the burden is on the defendant that the money given to him by the plaintiff was not a friendly loan.

[22] It was submitted that likewise in the present case, where the facts were very similar to the facts in *Tan Aik Teck v Tang Soon Chye*, the learned trial judge ought to have held that the undisputed payment and receipt of the moneys by the defendant, coupled with his non-reply to the two notices of demand, constituted sufficient evidence to discharge the plaintiff's evidential burden of proof that the payments were made for the purpose of a friendly loan, on a balance of probabilities. In other words, the learned trial judge ought to have found that the plaintiff had on the evidence established a prima facie case of a friendly loan and the burden was shifted to the defendant to prove otherwise, which he had failed to do so.

[23] We however observed that the learned trial judge's rejection of the decision in *Tan Aik Teck v Tang Soon Chye* was based on the footing that this case did not establish a general principle of law that, where the existence of a friendly loan was alleged, all that the party bearing the evidential burden needs to show is the fact of payment and receipt, which thereafter places the evidential burden on the other party to show that the payment was for some other purpose.

[24] We were of the considered view that the learned trial judge's finding was based on his own misconstruction or misunderstanding of the plaintiff's counsel's submission. We did not see in his submission any suggestion by learned counsel that *Tan Aik Teck v Tang Soon Chye* had laid down such a general principle of law and the learned trial judge was bound by the said principle of law.

[25] As pointed out by the plaintiff's counsel, the present case before us is a very simple case. We are here talking about a transaction involving the passing

of moneys from one experienced businessman to an equally experienced businessman of equal standing. One party alleges that the moneys were made as personal loans while the other party, while admitting the receipt of moneys, denied they were loans. He however did not respond to the demands for the return of the moneys nor did he offer any explanation or excuse as to the real purpose for which such payments were made to him. He was content to keep perfectly silent about the matter and when he was subsequently sued in court, to simply deny the existence of the loans and challenge the other party to prove his claim.

[26] As if it was not bad enough, having pleaded a negative or bare denial defence, the defendant then attempted during the trial to adduce evidence to show that the payments were purportedly pursuant to a 'business arrangement' and sought to adduce elaborate explanation for such business arrangement. The learned trial judge had dismissed the defendant's purported new defence on the ground that 'the defendant, in his pleaded defence, denied the existence of the friendly loan and put the plaintiff to strict proof of his claim. There was no plea of an affirmative case, namely, that the payments were made in furtherance of the financial arrangement. It was therefore not open to defendant to pursue in argument an unpleaded affirmative case'.

[27] We entirely agreed with the finding of the learned trial judge on this issue. As has been held in a number of case law authorities a general plea 'that the plaintiff's claim is denied and the plaintiff is put to strict proof thereof' is not a sufficient traverse of the plaintiff's claim. These authorities also show the need to adhere strictly to the rule relating to pleading, the failure of which would attract serious consequences (sees *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 at p 429 (SC); *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 at p 206 (FC); *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99 (CA, Singapore) and *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188).

[28] For example, in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, the Federal Court, in holding that the respondent's cause of action against the appellant was for breach of contract and not the joint venture agreement, held at paras 33 and 35 of its judgment as follows:

> [33] It is a cardinal rule in civil litigation that parties must abide by their pleadings. This is trite as can be seen from the decision of this court in *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 where Ong Hock Thye CJ said:
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> > I think it is necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co Ltd & Anor v Southport Corporation* [1956] 2 WLR 81 at p

91:

> If an appellate court is to treat reliance as pedantry or mere formalism, I do not see what part they play in our trial system.

...

[35] On this, we would like to add that it is not duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[29] In *Lee Ah Chor v Southern Bank Bhd*, the Supreme Court quoted with approval the following passage of Sharma J's judgment in the case of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 at p 197 which reads as follows:

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, Constitution and the government depends to a large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realize that what they do does not in any way diminish that faith...

[30] Now in a typical case where two versions are presented before the court, the court's role is of course to determine, based on the pleaded case and the evidence adduced before it, which version is more probable or plausible. Nevertheless, in the present case, with the rejection of the new defence of 'business arrangement' by the learned trial judge, there was actually only one version of the plaintiff before the court, ie that the payments were made in furtherance of a friendly loan.

[31] Considering that this is a civil case where the burden on the plaintiff is only to prove his case on a balance of probabilities, the learned trial judge ought to have held that based on the facts and circumstances of this case, in the absence of any explanation from the defendant on the purpose of the payments, the plaintiff's version that the payments to the defendant were for the purpose of a friendly loan must be true.

THAT THE NOTICES OF DEMAND WERE NOT CORROBORATIVE EVIDENCE OF THE FRIENDLY LOAN

[32] In dismissing the plaintiff's claim, the learned trial judge had also rejected the notice of demand issued by the plaintiff in September 2011 as a contemporaneous document to prove the friendly loan on the ground that it was written some two years after the last payment was made and in likelihood with litigation in mind.

[33] On this issue, the plaintiff's counsel had in his submission before the High Court referred to the decision of this court in the case of *Wong Hong Leong David v Norazman bin Adnan* in which it was held that the fact that Wong had not responded to Noorazman's letter of 17 December 1991 with a prompt and vigorous denial tended to show that such an agreement did in fact exist between them. This case, argued counsel, supported the proposition that the failure of the defendant in this case to reply to the plaintiff's letter of September 2011 (and the plaintiff's solicitor's letter of May 2012) amounted to an admission by the defendant that the payments were indeed in the nature of loans.

[34] The learned trial judge disagreed with the submission of learned plaintiff's counsel. He distinguished *Wong Hong Leong David v Norazman bin Adnan* from this case based on the facts. This was stated at paras 19–21 of his grounds of judgment as follows:

> 19. In my judgment, whether or not a court should draw an inference from the silence of a party must depend on the particular factual circumstances of each case. The protean and multitudinous nature of cases before a judge necessarily means that no judge can be bound by a particular finding of fact by a court that had preceded him or her. In *Wong Hon Leong David v Noorazman bin Adnan*, *the letter must have been written within a period of not much more than three months after the agreement, because the decision of the land administrator was communicated on 16 September 1992 and the letter from Noorazman reciting the fact of the agreement on the issue of access was dated 17 December 1991. To my mind, there was a reasonable degree of contemporaneity between the fact of the agreement and the letter recording its terms.*
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> 20. In the present case, the amounts were transferred by the plaintiff between the period of June 2008–April 2009. The plaintiff's letter was written more than two years later, while his solicitor's demand was made more than three years after the last transfer of the money. Both were, in all likelihood, made in preparation for trial. Accordingly, in my view, the evidentiary value of the silence on the part of the defendant is next to naught.
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> 21. As counsel for the defendant argued, there could have been many reasons why the defendant had not replied, not least the fact that he considered the demand so preposterous that he did not wish to dignify it with a reply.

[35] The plaintiff's counsel submitted before us that the learned trial judge's view of the contemporaneity in the case of *Wong Hon Leong David v Noorazman bin Adnan* was misconceived as the dates between the date of application and the letter from the respondent ('Noorazman') to the appellant ('Wong') on the terms of the fee arrangement were definitely more than one and a half years and not three months as held by the learned trial judge.

[36] In fact, in that case Noorazman had undertaken his work to secure the conversion approval sometime in January 1991 after the agreement between the parties in respect of the fee payable. He however only wrote to Wong sometime in December 1991 confirming the fee agreement of additional work, to which Wong did not reply. The letter from the land administrator approving the application was dated September 1992. Clearly there was a time lapse between January 1991–September 1992, yet this court held that the failure of Wong to reply the letter with a prompt and vigorous denial was corroborative of the existence of the agreement to pay the fee, as alleged by Noorazman.

[37] In this case, the plaintiff's letter requesting for the return of the friendly loan was a demand that would have been made by any reasonable person who had given a friendly loan and is well within the limitation period.

[38] It was further submitted that the learned trial judge had misdirected himself when he held that the non-answering of the letters of demand was not corroborative of a friendly loan as there could be many reasons why the defendant did not reply to those letters.

[39] The defendant when giving evidence purported to explain why he did not reply to the letters of demand in the following manner:

> ... I didn't want to respond to the letter to go and pick an argument with somebody saying something not truthful. All I know is the relationship had soured and that we were broken off and I have signed the settlement agreement. If anything on to us it must be on the settlement agreement. It was not reflected in the settlement agreement. Somebody writes you a letter one and half or two years later calling this loans and if react to it and I'm leaving that person room I don't know where he is trying to drive it.

[40] It was submitted that it defies common sense that one would choose to remain silent when a claim is made alleging a friendly loan being given especially so when it is by a friend whom one has had a soured relationship! The conclusion one can make is that it was in fact true that the monies transferred from the plaintiff and received by the defendant were a friendly loan. Further the respondent filed a statement of defence which was a mere denial of the plaintiff's statement of claim.

[41] It was therefore submitted that the learned trial judge erred in refusing to accept the plaintiff's letters of demand as contemporaneous documents as proof of the friendly loan. Further, the learned trial judge also erred in his judgment in not making any finding on the evidence of the plaintiff that the friendly loan was based on the oral request of the defendant.

[42] We found considerable merits in the plaintiff's counsel's submission that the learned judge was plainly wrong in his finding on this issue for the following reasons.

[43] In rejecting the two notices of demand as contemporaneous documents in proof of the friendly loan, the learned trial judge had ruled that the letters were in likelihood written in anticipation of litigation. However, the only reason given by him for saying so was the fact the first letter (from the plaintiff himself) was written some two years and the second demand (from his solicitor) was some three years after the last payment.

[44] However, to our minds that was not the real issue. What we are really concerned with in the present case relates to ordinary and normal human conduct, that is, how would a normal and reasonable person in the defendant's position as an experienced and seasoned businessman, faced with such a serious allegation that he owed a huge sum of money given to him as loans, react in such a situation? Would he remain silent and do nothing at all or would he react with indignation to what he considers as a baseless demand and would even immediately sign off a letter to not only deny the baseless allegation but also to set the record straight on the real purpose for which such payments were made. The answer would have been so obvious to the learned trial judge.

[45] What was even more surprising in the present case was that the learned trial judge had acceded to the defendant's counsel's submission that 'there could have been many reasons why the defendant had not replied' and was naive enough to accept the explanation given by the defendant to the effect 'that he considered the demand so preposterous that he did not wish to dignify it with a reply' as a valid reason for not replying to the letters of demand!

[46] Indeed, we were entirely in agreement with the plaintiff's counsel that the defendant's explanation defies common sense and logic and not in compliance with ordinary human conduct and his explanation for his complete silence was a mere excuse and an afterthought which had no probative value in law. The defendant should have been held to have admitted to the existence of the friendly loan on this ground alone.

[47] The defendant's counsel had submitted before us that the defendant is a man of means and there was no need or reason for him to resort to getting

loans from the plaintiff. Be that as it may, unfortunately for the defendant, courts determine disputes between litigants based not on their station in life but on their pleaded case and the evidence they adduced during the trial.

[48] In fact, the same argument was also put up by the defendant's counsel in *Tan Aik Teck v Tang Soon Chye* but it was rejected by this court based on the following grounds:

> [3] The defendant claimed that he is a very rich man with millions to his credit while the plaintiff is a poor man with no means. Yet he admitted receiving the loan amount from the plaintiff and banked it into his account.
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> ...
>
> [6] In my view, it does not matter whether the defendant was a millionaire and the plaintiff was a pauper, the undisputed facts remained that the plaintiff did issue two cheques amounting to the amount claimed to be the loan and the defendant admitted receiving those cheques and banked them into his account. As I have stated earlier, it was for the defendant to explain to the court what was the money for if it was not a friendly loan.

[49] Indeed, as submitted by the plaintiff's counsel, at the end of the day, the present case before us is a very simple case. That payments had been made by the plaintiff and received by the defendant was not in dispute. What was in dispute relates to the purpose of such payments. The plaintiff said they were for a friendly loan while the defendant at first denied they were loans and put the plaintiff to strict proof but then on second thought during the trial claimed they were pursuant to a financial arrangement, which was rightly rejected by the learned trial judge as not his pleaded case.

[50] As rightly pointed out by the learned trial judge himself, in a civil case the plaintiff bears both the legal and evidential burden of proof (see ss 101 and 103 Evidence Act 1950). It is also trite law that legal burden is imposed by law and remains with the plaintiff throughout the trial and never shifts to the defendant. On the other hand, evidential burden moves to and fro between the plaintiff and the defendant depending on the state of the evidence introduced at any one stage of the trial, and unless and until the plaintiff discharges his evidential burden by establishing a prima facie case, there is no burden on the defendant to prove his defence, no matter how weak his defence might be.

[51] Applying the legal principle governing the burden of proof in a civil claim, we were in entire agreement with the plaintiff's counsel that based on the facts and circumstances of the present case as set out above, the plaintiff was entitled to rely on the cases of *Wong Hong Leong David v Norazman bin Adnan* and *Tan Aik Teck v Tang Soon Chye Tan* as authorities for saying that the plaintiff had sufficiently discharged his evidential burden to establish a prima facie case that the payments made to the defendant were for the purpose of a friendly loan

and the burden was shifted to the defendant to prove, by admissible evidence based on his pleaded case, that the payments were not made pursuant to a friendly loan, which the defendant had failed to discharge.

THAT THE SETTLEMENT AGREEMENT DID NOT ALLUDE TO THE FRIENDLY LOAN

[52] In his judgment, the learned trial judge had earlier explained, as part of the background facts, how the settlement agreement came to be entered between the parties and they were these. The parties were once friends, and together held shares in a number of joint venture companies. They had a falling out and so they entered into the settlement agreement on 10 August 2009, to document, among others, the distribution of the assets of the joint venture companies.

[53] The learned trial judge opined that while the settlement agreement had meticulously dealt with not only the distribution of the assets of the joint venture but also the apportionment of liabilities, yet it did not deal with, let alone acknowledge, the existence of any outstanding loan from the plaintiff to the defendant arising from the payments that were the subject matter of the dispute. Therefore, the plaintiff's assertion of a friendly loan existing between the parties could not be true.

[54] In this regard, we were again in entire agreement with the submission of the plaintiff's counsel that the learned trial judge erred in making such a finding. As he himself had acknowledged at para 48 of his judgment, the settlement agreement was 'to deal with the distribution of the assets of the joint venture and the apportionment of liabilities'. That such was the intention of the parties could be discerned from cl 10 of the settlement agreement which reads as follows:

> Gerard wants to exit from the companies and business with Kasi and the Pantai Group of Companies constitutes the major business relationship between Kasi and Gerard. Both parties have now agreed to amicably *divide* and *distribute* the assets of the Pantai Group of companies referred ...

[55] Hence, the plaintiff's evidence that the settlement agreement was in effect an agreement to settle the business dealings between the plaintiff and defendant with respect to their joint venture shareholdings, division of business assets and existing loans/guarantees with financial institutions was entirely consistent with the intention expressed in cl 10 of the agreement.

[56] The plaintiff had also given evidence that the friendly loan was given on a personal basis, there being a relationship of trust, as admitted by the parties. Since the settlement agreement was intended to address the issues revolving the

joint venture business between the parties, the learned trial judge ought to have accepted as reasonable the plaintiff's explanation why the settlement agreement made no mention of the personal loans between the parties.

[57] We also agreed with the plaintiff's counsel that the learned trial judge erred in relying on the settlement agreement as one of the grounds for dismissing the plaintiff's claim as it has not been pleaded by the defendant. We were unable to accede to the submission of the defendant's counsel that although the settlement agreement was not pleaded by the defendant in his defence, it had been referred to the plaintiff during the trial and the learned trial judge was therefore entitled to rely on it to dismiss the plaintiff's claim. We were of the opinion that the settlement agreement was in exactly the same position as the defence of 'business arrangement' which was rightly rejected by the learned trial judge as an unpleaded case and therefore not worthy of any consideration.

DECISION AND ORDER

[58] For the reasons stated above, we allowed the appeal with costs and set aside the order of the High Court. We awarded agreed costs of RM15,000 to the plaintiff and also ordered deposit to be refunded.

Appeal allowed with costs of RM15,000; order of High Court set aside.

Reported by Fatin Mohd Ismail